



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

WATERFORD ALUMINUM COMPANY,
INC.,

Respondent.

OSHRC Docket No. 10-1163

APPEARANCES:

Denise C. Hockley-Cann, Attorney; Joan E. Gestrin, Regional Solicitor; M. Patricia Smith, Solicitor; U.S. Department of Labor, Washington DC and Chicago, Illinois
For the Complainant

Tamlyn Plohocky, *pro se*; Waterford Aluminum Company, Inc., Waterford, Wisconsin
For the Respondent

DIRECTION FOR REVIEW AND REMAND ORDER

Before: ROGERS, Chairman; THOMPSON and ATTWOOD, Commissioners.

BY THE COMMISSION:

On March 21, 2011, former Administrative Law Judge Benjamin R. Loye issued a default judgment against Waterford Aluminum Company, Incorporated (“Waterford”) based on its failure to timely file an answer to the Secretary’s complaint and respond to an Order to Show Cause. For the reasons that follow, we direct this case for review, set aside the judge’s decision and remand this case for further proceedings in a manner consistent with this opinion.

BACKGROUND

Following the issuance of a single-item citation on May 19, 2010, Waterford, appearing *pro se*, timely filed a notice of contest (“NOC”). On July 8, 2010, this case was designated to proceed under Simplified Proceedings but was subsequently returned to conventional proceedings after the judge granted the Secretary’s Unopposed Motion to Return the Matter to

Regular Trial Proceedings. The judge also granted the Secretary's request for an extension of time to file her complaint, which she timely filed on August 6, 2010. Under Commission Rule 34(b)(1), Waterford was required to file an answer by August 26, 2010. 29 C.F.R. § 2200.34(b).

On January 13, 2011, having received no filings from Waterford, the judge *sua sponte* issued a Show Cause Order—sent by certified mail, return receipt requested—directing Waterford to file an answer, or an explanation as to why it could not, on or before February 7, 2011. *See* 29 C.F.R. § 2200.101(a) and 101(d) (setting forth default procedure for party's failure to proceed and requirement that show cause order be served by certified mail, return receipt requested). In the order, the judge stated that he would dismiss Waterford's NOC if no answer or explanation was received by that date. The show cause order was sent to Tamlyn Plohocky, the Waterford employee who signed the NOC, at P.O. Box 150, Waterford, Wisconsin 53185. There is no signed return receipt in the record, but the show cause order has not been returned to the Commission.

On March 8, 2011, the judge sent the parties a notice of his decision, in which he vacated Waterford's NOC and affirmed the citation. On March 14, 2011, Ms. Plohocky sent a letter to the judge, which the Commission has construed as a petition for discretionary review.

ANALYSIS

The Commission has consistently held that that “ ‘dismissal of a citation is too harsh a sanction for failure to comply with certain prehearing orders unless the record shows contumacious conduct by the noncomplying party or prejudice to the opposing party.’ ” *AA Plumbing, Inc.*, 20 BNA OSHC 2203, 2204, 2004-09 CCH OSHD ¶ 32,795, p. 52,446 (No. 04-1299, 2005) (citation omitted). Here, the judge characterized Waterford's failure to file an answer and respond to his show cause order as “contumacious conduct justifying sanctions.” However, we find the record insufficient to establish contumacy where it is unclear whether the judge's show cause order was ever received by Waterford. *See Samuel Filisko*, 20 BNA OSHC 2204, 2206, 2004-09 CCH OSHD ¶ 32,855, p. 52,963 (No. 04-1465, 2005) (“[W]ith only [employer's] failure to file a timely answer before [the judge], and no indication on the record that [it] had received his show cause order, we see no basis for the judge's conclusion that [employer] either ‘has abandoned the case or treats the Rules of Procedure of the Commission with disdain.’ ”). In addition, Ms. Plohocky explains in the petition that Waterford experienced a water pipe break around the time the show cause order was sent that required its office to cease

operations for more than a week, delaying her ability to retrieve relevant documents until February 12, 2011.

The record also suggests that Ms. Plohocky, as Waterford's pro se representative, may have been confused by the Commission's procedural requirements. In the petition, Ms. Plohocky makes the following representations: (1) "[a]fter correspond[ing] with [Secretary's counsel] and a representative from the Milwaukee Office, I believed that what had to be done was to correct the violation[, which] is what we researched and accomplished"; and (2) "[o]n September 27, 2010 there was a motion for an Extension of Time to File An Answer for Abatement" and "we did not receive a reply."¹ In addition, Ms. Plohocky states that Waterford was moving "forward with the correction of the violation [and] that [was] completed on January 29." She then "apologize[s] for the tardiness in forwarding the correction of the violation."

Based on these various representations, it appears Ms. Plohocky believed that correcting the violation and sending notification of that correction was all that was necessary to resolve this matter. As such, it is not clear that she understood that filing an "answer" meant something other than forwarding OSHA a notice regarding Waterford's abatement of the alleged violation. *See Bilodeau Homes*, 21 BNA OSHC 1292, 1294, 2005-2009 CCH OSHD ¶ 32,805 p. 52,532 (No. 05-0231, 2005) (citing *Action Group*, 14 BNA OSHC 1934, 1935, 1987-1990 CCH OSHD ¶ 26,199, p. 39,018 (No. 88-2058, 1990)) (noting that "Commission has long recognized that...employers appearing pro se are 'often confused by legal terminology and may not be fully cognizant of the legal technicalities of the judicial process.' ").² Finally, we note that the Secretary does not claim that she was prejudiced by Waterford's failure to timely file an answer or respond to the show cause order.

Under these circumstances, we conclude that the present record does not support the judge's sanction of dismissal. *See WR Exterior Design Construction, Inc.*, 22 BNA OSHC 1391,

¹ The Commission has no record of the motion referenced by Waterford.

² We note that the judge expressly stated in his order returning this case to conventional proceedings that "[t]he Answer shall be filed on or before August 26, 2010." *Cf. Bilodeau Homes*, 21 BNA OSHC at 1294, 2005-2009 CCH OSHD at p. 52,532 (questioning whether judge's failure to specify pleading requirements in his order removing case from EZ Trial docket created confusion for pro se respondent). However, given the statements in Waterford's petition, it remains unclear whether Ms. Plohocky understood what the judge meant by an "answer" in the context of a Commission proceeding.

1392, 2004-09 CCH OSHD ¶ 33,006, p. 54,232 (No. 08-0474, 2008) (citing *Samuel Filisko*, 20 BNA OSHC at 2206, 2004-09 CCH OSHD at p. 52,963 (“[L]ate filing alone without evidence of prejudice, contumacious conduct and/or a pattern of disregard for Commission rules would not be a basis for dismissing this case.”)); *see also Merchant’s Masonry Inc.*, 18 BNA OSHC 1936, 1937, 1999 CCH OSHD ¶ 31,931, p. 47,369 (No. 99-0189, 1999) (stating that Commission has issued remand where small pro se employer makes some factual claims that might justify setting aside dismissal). Accordingly, we direct this case for review, set aside the judge’s decision in accordance with Commission Rule 101(b), 29 C.F.R. § 2200.101(b), and remand this case to the Chief Administrative Law Judge. On remand, Waterford should be afforded an opportunity to explain its failure to timely file an answer and respond to the show cause order.

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Horace A. Thompson III
Commissioner

/s/
Cynthia L. Attwood
Commissioner

Dated: April 25, 2011

**UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

Secretary of Labor,

Complainant,

v.

Waterford Aluminum Company, Inc.,

Respondent,

OSHRC DOCKET NO. 10-1163

Before: Administrative Law Judge Benjamin R. Loye

DECISION AND ORDER

Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 *et seq.* ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of a Waterford Aluminum Company, Inc. facility between January 6 and January 26, 2010. As a result of the inspection, OSHA issued a *Citation and Notification of Penalty* to Respondent alleging one serious violation of the Act with a proposed penalty of \$375.00. Respondent contested the citation item.

On July 8, 2010, this case was designated to proceed under the Commission's Simplified Proceeding rules. On July 23, 2010, as a result of *Complainant's Unopposed Motion to Return Matter to Regular Trial Proceedings*, the court issued an *Order* returning the case to the conventional docket and requiring Respondent to file an Answer by August 26, 2010. Respondent never filed an Answer. Therefore, on January 13, 2011, the court issued an *Order to Show Cause* to Respondent, by certified mail, requiring Respondent to file an Answer by February 7, 2011 or show cause as to why Respondent was unable to file an Answer. The *Order*

to Show Cause warned that failure to file an Answer or an explanation regarding its inability to file an Answer by February 7, 2011 would result in an order dismissing Respondent's *Notice of Contest* and affirming the citations and penalty as proposed. Respondent did not respond to the *Order to Show Cause*.

Commission Rule 101(a) provides "[w]hen any party has failed to plead or otherwise proceed as provided by these rules or as required by the Commission or Judge, he may be declared to be in default either on the initiative of the Commission or the Judge, after having been afforded an opportunity to show cause why he should not be declared in default ... [t]hereafter, the Commission or Judge, in their discretion, may enter a decision against the defaulting party ..."

Respondent has demonstrated a pattern of disregard for the procedural requirements and authority of the Commission by: (1) failing to file an Answer pursuant to Commission Rule 34(b) and the court's *Order* of July 23, 2010, and (2) failing to respond to the January 13, 2011 *Order to Show Cause*. Respondent's repeated failure to participate in this proceeding constitutes contumacious conduct justifying sanctions. *Philadelphia Construction Equipment, Inc.*, 16 BNA OSHC 1128, 1993 CCH OSHD ¶30,051 (No. 92-0899, 1993); *Sealtite Corporation*, 15 BNA OSHC 1130, 1991 CCH OSHD ¶29,398 (No. 88-1431, 1991). Accordingly, Respondent's *Notice of Contest* is hereby VACATED and the violation alleged in the *Citation and Notification of Penalty* is AFFIRMED.

SO ORDERED.

Date: March 21, 2011
Denver, Colorado

_____/s/_____
BENJAMIN R. LOYE
Judge, OSHRC